

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On June 6, 2016 appellant, then a 58-year-old case advocate, filed an occupational disease claim (Form CA-2) alleging that she developed anxiety and stress due to factors of her federal employment. She explained that she experienced a rapid heartbeat, sweating, body aches, and crying, particularly before she arrived to work in the morning, which started to affect her family and social life. Appellant noted that she first became aware of her condition and its relation to her federal employment on January 7, 2016. On the reverse side of the claim form, the employing establishment indicated that she stopped work and was last exposed to the claimed conditions on May 24, 2016.

Appellant provided a June 9, 2016 narrative statement and alleged that she was harassed by management because of her job performance. She noted that she was promoted from an intake advocate, General Schedule (GS)-7 pay grade, to a case advocate, GS-9 pay scale, in September 2014. Appellant alleged that for five years she had not received a step increase, and that for three of the five years she had not received a job performance award. She asserted that her position as a case advocate was very stressful, that she had over 80 cases, and that she was still learning the job. Appellant alleged that she was threatened with termination if her performance did not improve. She noted that she used leave when her job stress overwhelmed her and that, when she returned to work on May 28, 2016, management had inputted her leave and attendance time as her final pay. A coworker helped appellant to correct the attendance form.

Appellant recounted that on May 28, 2016 S.S. her second-line supervisor, requested a meeting. During the meeting she asked if appellant wanted to return to her GS-7 position. Appellant asked about her pay and asserted that she was told that she could retain her pay for two years. She was informed that if she remained as a case advocate and her job performance did not improve then she would “be given a pink slip.” Appellant alleged that after speaking with the union and asking for the offer in writing, she was then informed that she could not retain her pay and that S.S. had posted the case advocate position to the public. She used leave due to experiencing stress following this incident. When appellant returned from leave, she indicated that she was unable to access her computer as a coworker had used it and not signed out.

Appellant related that S.S. subsequently asked to meet with her, but appellant asserted that she did not want to talk to S.S. and alleged that S.S. was in denial about the job she offered to appellant. She alleged that S.S. accused her of calling S.S. a liar, and began to yell and scream at her. Appellant denied making this slur or acting disrespectfully toward her supervisor or manager.

Appellant sought medical treatment on January 7, 2016 for possible depression and stress at work. On January 10, 2016 Dr. Afshan S. Malik, a Board-certified family practitioner, diagnosed acute stress reaction beginning December 17, 2015. On May 17, 2016 he diagnosed anxiety reaction, unspecified.

In a June 20, 2016 statement, appellant’s supervisor, A.D., noted that appellant had stopped work on May 24, 2016. She indicated that appellant referred to a May 28, 2016 meeting which actually took place on April 28, 2016. A.D. noted that appellant had no job performance issues or performance concerns until becoming a case advocate. She indicated that appellant was promoted to a case advocate in September 2014, attended four training courses, and was provided with three

different on-the-job instructors. A.D. asserted that appellant was not performing her duties at an acceptable level and the employing establishment offered to return her to her prior position of intake advocate. She indicated that appellant received performance awards in 2012, 2014, and 2015 while working as an intake advocate. A.D. alleged that appellant was disrespectful to her and to other employees in the office. She denied that appellant was threatened with termination. A.D. also denied inputting appellant's time for her.

In a July 1, 2016 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information including comments from a knowledgeable supervisor and an explanation of appellant's work activities. It afforded both parties 30 days to submit the necessary evidence.

On July 19, 2016 A.D. responded to OWCP's July 1, 2016 development letter. She disagreed that all case advocates were struggling and noted that a new employee was hired on July 12, 2015 and that this case advocate had successfully completed all formal training and was working independently at a fully successful level. A.D. asserted that management had offered appellant a chance to return to her previous position noncompetitively and that it had indicated that she would maintain retained pay for two years. However, it noted that this issue required further research. A.D. denied that appellant was threatened with removal.

A.D. alleged that appellant made comments that management was intentionally trying to deceive her and threatened her due to time keeping errors. S.S. acknowledged that she became frustrated with appellant's repeated accusations and raised her voice when advising appellant that she would not tolerate her telling staff members that she was a liar.

A.D. noted that appellant was promoted to the position of GS-9 case advocate on September 4, 2014 and completed the required training and was assigned an on-the-job instructor. Appellant required an extension of the training from June 30 until December 18, 2015 when she was released to work independently in her position.

On May 14, 2016 appellant requested to work four, 10-hour days a week which was approved. However, due to significant absences, management recorded her time in an effort to ensure that she was paid appropriately. When appellant returned to work, the prior pay period had been classified as her "final pay period." She alleged that this was a threat by management. A.D. denied this allegation.

On September 4, 2015 management determined that appellant's performance was insufficient to merit within-grade promotion, but that the promotion was in fact made. It made concessions to reduce her case inventory and provided on-the-job instruction. A.D. reported that appellant demonstrated minimal improvement in maintaining an inventory and effectively assisting customers. She noted that case advocate was a relatively demanding position and involved the planning, scheduling, and coordination of resolution activities and contacts with a high volume of taxpayers seeking assistance, often within prescribed time frames. On April 22, 2016 management was given the authority to backfill appellant's intake advocate position. It met

with her on April 28, 2016 and offered her the opportunity to noncompetitively return to her previous position. Management advised appellant of the need to fully explore the financial and other ramifications of such a decision if she was interested.

On February 29, 2016 appellant's annual evaluation reflected a minimally successful performance rating. It noted concerns of unscheduled absences which hindered inventory management practices, as well as management's ability to provide assistance and coaching. A.D. again denied that the employing establishment threatened to terminate appellant or give her a "pink slip."

In a September 9, 2016 statement, appellant alleged that in April 2016 A.D. and S.S. spoke to appellant in a conference room about refilling the intake advocate position following her promotion as she was struggling with the case advocate position. She asserted that S.S. informed her that she would be allowed to retain appellant's GS-11 pay in a GS-7 position for two years. Appellant further asserted that S.S. informed appellant that if she did not take the downgrade and her job performance did not improve she would be give a "pink slip." The managers afforded appellant two weeks to make a decision. Appellant spoke with a union representative and was directed to get the downgrade offer in writing. S.S. then informed appellant that she would not be entitled to GS-11 pay, but would be paid at a GS-7 salary. Appellant protested the change in terms, and S.S. alleged that she had not told appellant that she was definitely going to get GS-11 pay rate in the GS-7 position.

Appellant noted that, after using sick leave for a week, she returned to work and was unable to enter her time and attendance as the system contained a "final pay" status code. After an additional two-week period of sick leave, she was unable to utilize her computer as it had been locked. Appellant indicated that S.S. came to her workstation and she requested union representation. She alleged that S.S. was screaming, yelling, and accusing her of calling her a liar. Appellant stopped work on that date. She attributed her emotional condition to getting the case advocate promotion in September 2014, which was no longer a competitive position such that she was promoted to a GS-11 with one year in grade and a successful job performance. Appellant alleged that she was unable to meet the expectations of her position and that management was harassing her in an effort to make her retire or quit.

In a September 8, 2016 report, Dr. Louis Duchin, a Board-certified psychiatrist, diagnosed major depression and attributed this condition to workplace stress.

OWCP, in an October 11, 2016 development letter, requested additional factual and medical evidence in support of appellant's emotional condition claim. It provided her with a questionnaire for her completion and afforded her 30 days to respond.

Appellant provided a statement from her daughter, noting that appellant informed her that her position was stressful, that management was talking about her job performance, that appellant's work performance was never enough, that nothing she did was right, and management was continually pointing out mistakes. She worked late to complete her work and management continued to find her work insufficient.

By decision dated December 8, 2018, OWCP denied appellant's emotional condition claim finding that the evidence of record was insufficient to establish that she was injured in the performance of duty. It accepted as factual that she was given the option of returning to a lower-grade position as her performance as a case advocate was not improving. OWCP found no evidence of error or abuse by the employing establishment and that appellant's reaction was not compensable. It denied the remainder of her allegations as not factually substantiated.

On January 6, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

During the oral hearing held on June 8, 2017, appellant testified that she was promoted to case advocate in September 2014 as a GS-9 and to a case advocate GS-11 in September 2015. She alleged that the case advocate position required a year of training, was detailed, complex, and stressful. Appellant alleged that everyone received extended training from nine months to a year. In her June 2015 mid-year-evaluation, she was informed that she was not performing adequately. The employing establishment then offered appellant to return to the intake advocate position.

On June 29, 2017 S.S. responded to the hearing transcript and alleged that training extensions were not universal and that the request for a fourth extension for appellant was denied. She also noted that appellant had qualified the return to the intake advocate position by noting that appellant might not retain her GS-11 pay. S.S. asserted that, after putting the offer in writing, she was advised that appellant had indicated that she had lied to her. During a meeting with appellant, she made several derogatory comments which resulted in S.S. raising her voice and informing her that she would not tolerate being called a liar. S.S. denied threatening to give appellant a "pink slip."

In a July 5, 2017 response to the hearing transcript, A.D. asserted that problems existed with appellant's performance as it related to her technical knowledge and decision making after training. She alleged that S.S. informed appellant that she might be able to retain her pay and grade and that she would explore that option if appellant was interested. When appellant requested the offer in writing, S.S. contacted a personnel specialist and learned that appellant could not retain her pay. A.D. confirmed that S.S. yelled at appellant noting that she was frustrated with appellant.

Appellant disagreed with these responses on July 14, 2017. She asserted that she was having problems keeping up with her job duties and that the job was stressful. Appellant also alleged that management was harassing her.

By decision dated July 28, 2017, OWCP's hearing representative denied her emotional condition claim, finding that appellant had not substantiated a compensable factor of employment and.

On June 10, 2018 appellant, through counsel, requested reconsideration of the July 29, 2017 decision. In a May 31, 2018 statement, appellant alleged that all she wanted to do was to learn her job so she could help the customer to the best of her ability. She alleged that when she became a GS-11 her job performance was no longer good enough. Appellant continued to allege that management harassed her by constant criticism.

By decision dated September 5, 2018, OWCP denied modification of its prior decision. It found that appellant had not substantiated a compensable factor of employment.

### **LEGAL PRECEDENT**

To establish an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; (2) rationalized medical evidence establishing that he or she has an emotional condition or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.<sup>3</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>4</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.<sup>5</sup> When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.<sup>6</sup>

Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.<sup>7</sup> Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.<sup>8</sup> Personal perceptions alone are insufficient to establish an employment-related emotional condition, and disability is not covered where it results from such factors as an employee's fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment, or to hold a particular position.<sup>9</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than regular or specially assigned work duties of the employee and are not covered under FECA.<sup>10</sup> Where the evidence demonstrates

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<sup>3</sup> *W.F.*, Docket No. 18-1526 (issued November 26, 2019); *C.M.*, Docket No. 17-1076 (issued November 14, 2018); *C.V.*, Docket No. 18-0580 (issued September 17, 2018); *Kathleen D. Walker*, 42 ECAB 603 (1991).

<sup>4</sup> 28 ECAB 125 (1976).

<sup>5</sup> *G.M.*, Docket No. 17-1469 (issued April 2, 2018); *Robert W. Johns*, 51 ECAB 137 (1999).

<sup>6</sup> *A.C.*, Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, *supra* note 4.

<sup>7</sup> *A.C.*, *id.*

<sup>8</sup> *G.R.*, Docket No. 18-0893 (issued November 21, 2018).

<sup>9</sup> *A.C.*, *supra* note 6.

<sup>10</sup> *C.V.*, *supra* note 3.

that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.<sup>11</sup>

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.<sup>12</sup> Mere perceptions of harassment or discrimination are not compensable under FECA.<sup>13</sup> Aclaimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.<sup>14</sup> Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.<sup>15</sup> Additionally, verbal altercations and difficult relationships with supervisors, when sufficiently detailed by the claimant and supported by the record, may constitute factors of employment. This does not imply, however, that every statement uttered in the workplace will give rise to coverage under FECA.<sup>16</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and work conditions. OWCP denied her emotional condition claim, finding that she had not established a compensable employment factor. The Board must, therefore, initially review whether these alleged incidents are covered employment factors under the terms of FECA.<sup>17</sup>

Appellant attributed her emotional condition in part to *Cutler* factors. She alleged that her new job was very stressful, that she had over 80 cases, and that she was still learning the job. Appellant asserted that the case advocate position required a year of training and was detailed and complex. She alleged that she was unable to meet the expectations of this position. On July 14, 2017 appellant again asserted that she was having problems keeping up with her job duties and that the job was stressful. She contended that all she wanted to do was to learn her job so she could help the customer to the best of her ability and that when she became a GS-11 her job performance was no longer good enough. Appellant alleged that she was offered the opportunity to return to her intake advocate position as she was struggling with the case advocate position.

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<sup>11</sup> *Id.*

<sup>12</sup> *O.G.*, Docket No. 18-0350 (issued August 7, 2019); *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

<sup>13</sup> *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *M.D.*, 59 ECAB 211 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>14</sup> *J.F.*, 59 ECAB 331 (2008); *Robert Breeden*, *supra* note 12.

<sup>15</sup> *T.Y.*, Docket No. 19-0654 (issued November 5, 2019); *G.S.*, Docket No. 09-0764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

<sup>16</sup> *Y.B.*, Docket No. 16-0193 (issued July 23, 2018); *Marguerite J. Toland*, 52 ECAB 294 (2001).

<sup>17</sup> *Y.W.*, Docket No. 19-1877 (issued April 30, 2020); *Dennis J. Balogh*, 52 ECAB 232 (2001).

A.D., appellant's supervisor, confirmed that appellant had no job performance issues or performance concerns until becoming a case advocate. She noted that, despite attending four training courses and working with three different on-the-job instructors, appellant was not performing her case advocate duties at an acceptable level. On September 4, 2015 management determined that appellant's performance was insufficient to merit within-grade promotion, but that the promotion was in fact made. It made concessions to reduce her case inventory and provide on-the-job instruction. A.D. reported that appellant demonstrated minimal improvement in maintaining an inventory and effectively assisting customers. On July 5, 2017 she asserted that problems existed with appellant's performance as it related to her technical knowledge and decision making after training. A.D. noted that case advocate was a relatively demanding position and involved the planning, scheduling, and coordination of resolution activities and contacts with a high volume of taxpayers seeking assistance often within prescribed time frames. The employing establishment offered to return appellant to her prior position of intake advocate as a consequence of her poor performance.

The Board has held that conditions related to stress from situations in which an employee is trying to meet his or her positions requirements are compensable.<sup>18</sup> The evidence in this case is sufficient to establish that appellant experienced difficulty in fully performing her regular assigned duties. The employing establishment did not dispute her description of her difficulties performing her job duties. Under *Culter*,<sup>19</sup> appellant has established a compensable work factor.

The Board further finds that appellant has not substantiated the remainder of her allegations. Appellant attributed her emotional condition to administrative and personnel actions, which are not compensable absent a showing of error or abuse on the part of the employing establishment.<sup>20</sup> These include leave and attendance issues,<sup>21</sup> and assignment of work.<sup>22</sup> Appellant has not submitted corroborating evidence of error or abuse in these administrative matters, and thus, has not established a compensable employment factor in this regard.<sup>23</sup>

Appellant alleged that S.S. yelled at her. Both A.D. and S.S. agreed that she raised her voice. Verbal altercations and difficult relationships with supervisors/managers, when sufficiently detailed and supported by the record, may constitute compensable factors of employment. However, this does not imply that every ostensibly abusive or threatening statement uttered in the workplace will give rise to coverage under FECA.<sup>24</sup> While A.D. and S.S. indicated that S.S.

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<sup>18</sup> *K.J.*, Docket No. 17-1851 (issued September 25, 2019); *P.W.*, Docket No. 08-0315 (issued August 22, 2008); *Jeral R. Gray*, 57 ECAB 611 (2006).

<sup>19</sup> *Supra* note 4.

<sup>20</sup> *A.C.*, *supra* note 6; *Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

<sup>21</sup> *Elizabeth Pinero*, 46 ECAB 123, 130 (1994).

<sup>22</sup> *Y.B.*, Docket No. 16-0194 (issued July 24, 2018); *Robert W. Johns*, 51 ECAB 137 (1999).

<sup>23</sup> *R.B.*, Docket No. 19-0343 (issued February 14, 2020); *R.V.*, Docket No. 18-0268 (issued October 17, 2018).

<sup>24</sup> *C.R.*, Docket No. 19-1721 (issued June 17, 2020).



became frustrated with appellant and raised her voice, there is no evidence that this rose to the level of verbal abuse.<sup>25</sup>

Appellant contended that she was harassed by her supervisors. She has not submitted any corroborative evidence to establish a factual basis for her allegations. As noted above, for harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under FECA. Based on the evidence of record, the Board finds that appellant has not established, with corroborating evidence, that she was harassed by the employing establishment.<sup>26</sup>

As OWCP found that there were no compensable employment factors, it did not analyze or develop the medical evidence. Thus, the Board will set aside OWCP's September 5, 2018 decision and remand the case for consideration of the medical evidence with regard to whether appellant has established an emotional condition in the performance of duty causally related to a compensable factor of her federal employment, *i.e.*, difficulty in fully performing her regular assigned duties.<sup>27</sup> After other such further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's emotional condition claim.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>25</sup> *Y.B.*, Docket No. 16-0194 (issued July 24, 2018).

<sup>26</sup> *Id.*

<sup>27</sup> *K.J.*, *supra* note 18.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 5, 2018 decision of Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 22, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board